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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

No. _____

PHILIPPINE PRESIDENT LINES, INC., MANILA,
Petitioner,

v.

JAMES TURNER and JAPAN LINE, LTD., Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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The petitioner, Philippine President Lines, Inc., Manila, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 27, 1981 in, Turner v. Japan Line, Ltd., (9th Cir. 1981) 651 F.2d 1300. Docket Nos. 79-4060, 79-4062, 79-4182; CV. 75-727 ORS.

QUESTION PRESENTED FOR REVIEW

Should a "vessel" have a higher standard of care to United States longshoremen when loading cargo

in foreign ports than when loading cargo in United States ports? Turner v. Japan Line, Ltd., (9th Cir. 1981) 651 F.2d 1300. Or did the U. S. Supreme Court's decision in Scindia Steam Navigation Co. v. De Los Santos, determine a vessel's care standard to U.S. longshoremen regardless of where the cargo is loaded? Scindia Steam Navigation Co. v. De Los Santos, ____ U.S. ____, 101 S.Ct. 1614, 68L.Ed.2d 1 (1981).

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OPINION BELOW

The appendix includes the opinion of the Court of Appeals which was reported at 651 F.2nd 1300 (9th Cir. 1981) (App-1), that judgment (App-20), and the order denying the motion for rehearing of Philippine President Lines, Ltd. (App-21). The opinion of the Magistrate of the District Court for the District of Oregon is at App-16).

JURISDICTION

The judgment of the Ninth Circuit was entered on July 27, 1981 (App-1). Philippine President Lines, Ltd. timely filed a petition for rehearing on August 7, 1981. The order of the Ninth Circuit denying that petition was entered on May 24, 1982 (App-20). This court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

One federal statute is involved. The opinion below fixes the negligence for which a "vessel" is

liable under 33 U.S.C. §905(b) when loading cargo in a foreign port.

STATEMENT OF THE CASE

Federal jurisdiction was originally invoked pursuant to 28 U.S.C. §1332.

On June 13, 1974 at Longview, Washington, packages of plywood defectively stowed in the hold of the PRESIDENT QUEZON gave way injuring longshoreman James Turner who was employed to discharge the plywood. (R. 77-78, 104-105). Philippine President Lines, Ltd., owner of the PRESIDENT QUEZON, had time-chartered it to Japan Line (Ex. 2). Pursuant to that charter, Japan Line hired a Japanese stevedore to load the packages of plywood aboard the PRESIDENT QUEZON in Japan (R. 210-211). Japan Line also hired a Japanese surveyor to inspect and approve the loading and stowage of the plywood (R. 218).

Longshoreman Turner sued Japan Line and

Philippine President Lines for "negligence" under 33 U.S.C. 905(b) (R. 78). There was no contention or evidence that the master or crew of the vessel had knowledge of the defective stowage in Japan. Philippine President Lines cross-claimed against Japan Line for full indemnity (R 214-216). Japan Line did not file an answer to the cross-claim nor seek a stay pending arbitration.

Upon trial of Turner's claim, the jury found in favor of Turner and against both Japan Line and Philippine President Lines returning a verdict in excess of $950,000 (R. 413). The trial judge granted both defendants judgment N.O.V. ruling the defendants owed no duty under 33 U.S.C. $905(b) for the negligence of a foreign stevedore.

The trial judge found there was no evidence upon which the jury could have found that the master or crew of the vessel should have known of the defective stowage by the Japanese stevedore (R. 530-532).

Longshoreman Turner appealed the judgment N.O.V. and the two defendants cross-appealed on the grounds of the excessiveness of the jury verdict. (R. 546-547, 554-555).

The Ninth Circuit reversed the trial judge finding the defendants had breached a newly created duty under 33 USC §905(b) to supervise the work of a foreign stevedore. (App. 8-9). 651 F2d at 1304.

Philippine President Lines petitioned for rehearing on August 7, 1981. On May 24, 1982, that petition was denied (App. 21).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Imposes on a "Vessel" a Higher Care of Standard When Loading in Foreign Ports When Loading in U.S. Ports Contrary to the Implications of Scindia Steam Navigation Co. v. De Los Santos, U.S. , 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981).

The Ninth Circuit recognized this court held

in Scindia that a shipowner had no continuing duty to inspect or supervise the cargo operations of the stevedore. Nevertheless, the Ninth Circuit decided that this holding was irrelevant when cargo operations occur in a foreign port. The Ninth Circuit noted that the third-party primarily negligent was not the injured longshoreman's employer, but rather the foreign stevedore who the injured longshoreman would find difficult to sue. Thereby leaving the injured longshoreman with "no practical remedy". The Ninth Circuit solved that problem by creating an exception to Scindia holding the shipowner had a continuous non-deligable duty of supervising cargo operations of a foreign stevedore.

> ". . . the negligence of the vessel is premised on failure of the master to exercise reasonable care in supervision of the work of the Japanese stevedore." 651 F.2d at 1304; App-8.

> "We hold, therefore, that the vessel had a duty to protect the plaintiff against concealed dangers created by a foreign stevedore which the vessel could, in the

> exercise of reasonable care, have corrected or warned of." 651 F.2nd at 1304; App-9.

In fashioning this exception, the Ninth Circuit failed to consider remedies available to the injured longshoreman. He always has the compensation rights against his employer given him by the Longshoremen's and Harborworkers' Act. 33 U.S.C. §901 et seq. The foreign stevedore would be amenable to suit in the State of Washington under its Long Arm Statutes. See Omstead v. Brader Heaters, Inc., 5 Wash App. 258, 487 P2d 234 (1971), Aff'd 80 Wash 2d 720, 497 P2d 1310 (Sup. Ct. 1972).

Instead, the Ninth Circuit gave the injured longshoreman a "practical remedy" against the otherwise non-liable shipowner or charterer leaving to them the task of seeking reimbursement from the primarily negligent foreign stevedore. In transferring the "no-practical remedy" from the longshoremen to the shipowner, the Ninth Circuit placed on the shipowner a care standard higher than that required by 33

U.S.C. §905(b) and this court's decision in Scindia Steam Nav. Co. v. De Los Santos, ___ U.S. ___, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

WOOD TATUM MOSSER
BROOKE & HOLDEN
JOHN R. BROOKE

By: _____
JOHN R. BROOKE
of Attorneys for Petitioner,
Philippine President
Lines, Inc.

APPENDIX A

OPINION OF THE NINTH CIRCUIT

James TURNER, Plaintiff-Appellant and Cross-Appellee,

v.

JAPAN LINES [sic], LTD., and Philippine President Lines, Inc., Manila, Defendants-Appellees and Cross-Appellants.

Nos. 79-4060, 79-4062 and 79-4182.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 11, 1980.

Decided July 27, 1981.

Appeal from the United States District Court Judges, and GRANT, District Judge.*

---

*The Honorable Robert A. Grant, Senior United States District Judge for the Northern District of Indiana, sitting by designation.

FLETCHER, Circuit Judge:

These are appeals and cross-appeals from a judgment n. o. v. for defendants Japan Lines [sic] and Philippine President Lines, following a jury trial in which plaintiff-appellant Turner received a verdict for $955,976.11. Turner appeals from the grant of judgment n. o. v.; Japan Lines [sic] and Philippine President Lines cross-appeal to attack the jury verdict, if it should be reinstated.

I.

FACTS

Turner was a longshoreman in Longview, Washington. On June 13, 1974, he was unloading plywood from the PRESIDENT QUEZON when a stack of plywood in the hold collapsed beneath him. Turner incurred serious injuries, and as a result now suffers from an apparently untreatable form of epilepsy.

The vessel PRESIDENT QUEZON is owned by Philippine President Lines (Owner). At the time of Turner's accident, the vessel was time-chartered to Japan Lines [sic], Ltd. (Time-Charterer) under the New York Produce Exchange charter party. The cargo of plywood was loaded on the PRESIDENT QUEZON in Kushiro, Japan by Mitsuwa Transport Co., a stevedore, pursuant to a contract with the Time-Charterer. Another Japanese firm was engaged to shore and lash the cargo, and the completed stow was inspected by a licensed Japanese marine surveyor.

At trial, Turner produced evidence to show how stacks of plywood should be stowed in the hold of a ship and how the plywood on which he was injured was improperly stowed. According to the testimony, the hull of the vessel curves outward and upward from the deck of the lower hold. This concave curvature is called the "sheer" of the ship. When bundles of plywood are stowed against the sheer, the first stack of bundles (three or four feet thick) is butted against the sweat battens, which protect the cargo from contact with the bare hull. Dunnage (lengths of scrap lumber) is placed on top of the stack to separate it from the stack above, so that

when the cargo is unloaded, the forks of lift trucks can be fitted between them. The next stack of plywood is placed atop the dunnage and butted against the sheer. This stack rests only partially on the first stack; part of it is unsupported from below because of the outward curve of the sheer. In order to prevent the stack from tipping under the weight of workers or of the stacks on top of it, it must be "shored" from below. The shoring consists of vertical lengths of lumber nailed upright between the dunnage timbers and the sweat battens of the hull. The shoring, or lack of it, is invisible to the offloading longshoreman until the plywood it supports is removed.

The evidence showed that no nails were found in the pile of lumber under the collapsed plywood after the accident. Expert testimony indicated that it should be inferred from this that the shoring had not been constructed properly. There was also evidence that a properly shored stack of plywood should not have collapsed under the weight of a longshoreman.

Witnesses testified that many hours of work by marine carpenters would have been required to build proper shoring. The vessel's log indicates the time at which the marine carpenters who constructed the shoring entered the hold. This, according to plaintiff, indicates that the master or one of the mates was aware that the shoring work had begun, and it had ample opportunity to monitor it.

Plaintiff also called expert witnesses who testified as to the duties of the master of the ship in overseeing the stow of the cargo. The experts testified that the master's primary duty is to protect the

seaworthiness of the vessel and the safety of the crew and passengers. The master is also responsible for the safety of the cargo and those who unload it. The master or one of his mates is always on watch on the vessel. The experts also testified that the master or one of his mates is responsible for overseeing the loading operations and particularly for ensuring that the cargo is properly shored.

The evidence showed that Turner was injured when he was standing atop three stacks of plywood, nine to twelve feet above the deck of the hold. He was in the process of rigging the ship's hoisting gear to the top stack of plywood when the stack tipped beneath him. The falling stack knocked the stacks underneath it away from the sheer of the hull, and the entire stack collapsed. Turner was struck on the head.

This testimony was uncontradicted by defendants, who submitted only documentary evidence. The magistrate instructed the jury that the Owner or the Time-Charterer or both would be liable to the plaintiff if the master of the vessel knew or in the exercise of reasonable care should have known of the defective stow and of the danger it posed. The magistrate also submitted to the jury the question whether, if the master of the vessel was found to have been negligent, he was acting for the Owner or the Time-Charterer or both. The jury returned its verdict for plaintiff against both defendants.

After the jury returned its verdict, the magistrate granted judgment n. o. v. to the defendants on the authority of *Ruffino v. Scindia Steam Navigation Co.*, 559 F.2d 861 (2d Cir. 1977). It is unclear from the order granting judgment whether the magis-

trate considered the evidence insufficient to go to the jury on the question of negligence, or whether he concluded that defendants had no duty to plaintiff as a matter of law.

The questions presented for our review are:

(1) whether the defendant(s) owed any duty to the plaintiff under the circumstances of this case;

(2) if so, whether the evidence was sufficient to support the jury's verdict;

(3) if so, whether under the charter party, the Owner or the Time-Charterer or both are liable to plaintiff for his injuries.

II

NEGLIGENCE

A. *Vessel's Duty to Longshoremen*

This case arises under § 5(b) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905(b) (1976). That section, as amended in 1972, gives an injured longshoreman a cause of action against a "vessel" for its negligence. "Vessel" is defined to include the vessel's "owner, owner pro hac vice, agent, operator, charter [sic] or bare boat charterer, master, officer, or crew member." 33 U.S.C. § 902(21). However, since the 1972 amendments the longshoreman no longer has an action against the vessel for unseaworthiness, a type of liability without fault. *Compare Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90

L.Ed. 1099 (1946), *with Scindia Steam Navigation Co. v. de los Santos*, ___ U.S. ___, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981).[1]

---

[1]Considerable controversy has arisen over what constitutes "negligence" as opposed to "unseaworthiness." Some commentators have suggested that the difference between the two causes of action is slight, since most unseaworthy conditions are the result of someone's negligence. See e. g., G. Gilmore & C. Black, The Law of Admiralty 452-55 (2d ed. 1975). The two situations in which an injured longshoreman can no longer recover from the vessel would seem to be (1) where the injury is the result of a condition of which the vessel has no notice or opportunity to correct, and (2) where the injury is caused entirely by the negligence of a third party, e. g., the longshoreman's stevedore-employer. Id. at 452. This interpretation comports well with the purposes of the 1972 amendments. See H.R.Rep. No. 92-1441, 92d Cong., 2d Sess., reprinted in [1972] U.S. Code Cong. & Ad.News 4698, 4699, 4703-05.

The Supreme Court has recently held that negligence under § 905(b) is to be measured by the general maritime standard of reasonable care under the circumstances and that

> [t]his duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known

> to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.

Scindia Steam Navigation Co. v. de los Santos, 101 S.Ct. at 1621. *Scindia* involved a longshoreman who was injured by an allegedly defective winch during offloading operations. The shipowner there contended that it had no duty to repair the ship's equipment once the stevedore had commenced work. The Court rejected this contention, holding that if the shipowner was or should have been aware of the winch's condition and of the unreasonable risk of harm to the longshoreman, and if it were clear that the stevedore would not or could not remedy the problem, the shipowner would have a duty to intervene. *Id.*

The defendants here argue that neither the Owner nor the Time-Charterer had any duty to supervise the activities of the loading stevedore, so that neither can be held liable to an offloading longshoreman for injuries which result from the loading stevedore's negligence. We have found one decision apparently adopting this view. *Ruffino v. Scindia Steam Navigation Co.*, 559 F.2d 861 (2d Cir. 1977).

There are, to be sure, other cases in which courts have rejected attempts by longshoremen to recover from a vessel for failure to supervise the work of the stevedore. With the exception of *Ruffino*, however, those cases involve injuries incurred during stevedoring operations and allegedly caused by the injured *employee's* stevedore-

employer's negligence. In this context, the Supreme Court in *Scindia* and the circuits in numerous cases have reviewed the reasons why, under the amended Act, it would be undesirable to impose liability on the shipowner for failing to supervise minutely the stevedore-employer's operations. *See, e. g., Scindia Steam Navigation Co. v. de los Santos*, ___ U.S. ___, 101 S.Ct. 1614, 1622-24, 68 L.Ed.2d 1 (1981); *Munoz v. Flota Merchante Grancolombiana, S. A.*, 553 F.2d 837, 840-41 (2d Cir. 1977). The shipowner, after the 1972 amendments, no longer has a right over against the stevedore-employer for its concurrent negligence. 33 U.S.C. § 905(b); *Scindia Steam Navigation Co. v. de los Santos*, 101 S.Ct. at 1624; *Munoz v. Flota Merchante Grancolombiana, S. A.*, 553 F.2d at 841. However, if the longshoreman recovers from the vessel in a negligence action, the stevedore-employer can then recover from the longshoreman the value of the compensation payments made to him. 38 U.S.C. § 933. Thus, the stevedore-employer would be effectively relieved of any liability, even if it were primarily at fault. This result would remove any incentive to the stevedore to improve the safety of its operations, thus vitiating one of Congress' goals in enacting the amendments. *Scindia Steam Navigation Co. v. de los Santos*, 101 S.Ct. at 1629 (Powell, J., concurring); *Munoz v. Flota Merchante Grancolombiana, S. A.*, 553 F.2d at 841.

This concern may be justified, but it has no relevance to the case before us. The third party that is primarily negligent is not the plaintiff's employer, but rather the Japanese stevedore (the negligence of the vessel is premised on failure of the master to exercise reasonable care in supervision of the work of the Japanese

stevedore). Section 905(b) does not bar the shipowner from recovering against the foreign stevedore, only from recovering against the "employer" as defined in the Act. 33 U.S.C. § 902(4). Second, the fact that the plaintiff's stevedore-employer will be able to recover the compensation payments it has made does not in any way diminish its incentive to maintain safe operations. The posited negligence here is that of the foreign stevedore; the parties agree that the stevedore-employer could not have prevented this accident by any exercise of care.

[1] To the contrary, imposing a duty on the Owner or Time-Charterer or both in this case should further the congressional goal of safety. The foreign stevedore, who is presumably primarily at fault, may in many cases be beyond reach of the court's processes, and the injured longshoreman would be unable to sue it. As between the vessel and the stevedore-employer, the vessel is the only one in a position to ensure the safety of the longshoremen. The offloading stevedore has no control whatsoever over the foreign stevedore. The vessel, on the other hand, can ensure safety by choosing a reliable foreign stevedore, supervising its work when necessary, and warning the offloading stevedore of concealed dangerous conditions created by the foreign stevedore. We do not believe that Congress, in enacting a careful scheme of compensation and liability, could have meant to leave the longshoreman to the mercies of foreign stevedores against which he may have no rights or, at least, no practical remedy. We hold, therefore, that the vessel had a duty to protect the plaintiff against concealed dangers created by a foreign stevedore which the vessel could,

in the exercise of reasonable care, have corrected or warned of.[2]

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[2] To the extent that this holding is inconsistent with the result reached in Ruffino v. Scindia Steam Navigation Co., 559 F.2d 861 (2d Cir. 1977), we must, for the reasons given above, disagree with the Second Circuit.

B. Sufficiency of the Evidence

[2] The next question we must consider is whether the plaintiff presented sufficient evidence from which the jury could have concluded that the vessel knew or should have known of the lack of shoring in the hold, and of the resulting danger. We think that sufficient evidence was presented.

This court will not disturb a jury's verdict "unless we find that the evidence was insufficient as a matter of law to support [the] verdict -- that the evidence was such that no reasonable man would accept it as adequate to establish the existence of each fact essential to liability." *Kunz v. Utah Power & Light Co.*, 526 F.2d 500, 504 (9th Cir. 1975). *See also California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727, 734 (9th Cir. 1979).

As noted above, the plaintiff presented experts who testified as to the custom in the industry with respect to the master's, and hence the vessel's, responsibility. Defendants argue that this testimony was irrelevant and entitled to no weight at all, because the experts spoke in terms of the master's duty to ensure the "seaworthiness" of the vessel, a concept

supposedly irrelevant under § 905(b). This argument, however, misses the point. The experts testified not about legal conclusions ("unseaworthiness" or "negligence") but about custom in the industry with respect to the master's duties. Furthermore, the master *is* responsible for the seaworthiness of the vessel; he is simply not liable without fault to injured longshoremen. *See, e. g., Nichimen Co. v. M. V. Farland*, 462 F.2d 319, 331-32 (2d Cir. 1972). Since the jury was quite properly not instructed in terms of strict liability for unseaworthiness, there is no possibility that it might have confused the two related meanings of the term.

The Supreme court in *Scindia* observed that a "necessary inquiry is whether the pertinent statutes, regulations, *or custom* place or assume a continuing duty on the vessel." 101 S.Ct. at 1626 (emphasis added). We believe that the expert testimony offered by plaintiff was relevant, and perhaps necessary, to establish the customary scope of the master's duties.

In addition to this expert testimony, plaintiff offered the testimony of longshoremen as to how the cargo should have been shored and how long the shoring should have taken; entries into the ship's log noting when the marine carpenter entered the hold; and testimony that the master or his mates were responsible for continuous

supervision of the loading operations, particularly the shoring of the cargo.[3]

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[3]The plaintiff also argues that he is entitled to the benefit of an inference against defendants because they failed to produce the testimony of Captain Pucan, the master of the vessel. Defendants had apparently notified plaintiff of their intent to produce Captain Pucan, and in fact he was present at the trial. Defendants put on no evidence at trial and neither plaintiff nor defendants called Captain Pucan. We need not address this argument because we hold that the plaintiff's evidence was sufficient to support the verdict without this inference.

Plaintiff also produced evidence that the stow of the cargo was unreasonably dangerous to the offloading longshoremen, and that the defect could have have been discovered by them.

We hold that the evidence taken together was sufficient to support the jury's verdict for plaintiff, and that the magistrate erred in giving judgment n. o. v. to defendants.

III

INDEMNITY

Having decided that the "vessel" negligently caused plaintiff's injuries, we must determine whether the liability falls on the Owner, the Time-Charterer, or both. The magistrate asked the jury to decide

whether, under Clause 8 of the charter party,[4] the master was acting for the Owner

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[4]Clause 8 of the charter party provides:

> That the Captain shall prosecute his voyages with the utmost dispatch, and shall render all customer assistance with ship's crew and boats. The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow and trim and discharge the cargo at their expense and risk under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts.

or the Time-Charterer when he failed properly to supervise the cargo operations. The jury responded by holding both defendants liable.

We think that the trial court misperceived the question, and that it was error to ask the jury to interpret the contract. First, the contract was not relevant to the *duty* owed by either defendant to the plaintiff. *Cf. Scindia Steam Navigation Co. v. de los Santos*, 101 S.Ct. at 1626 (contract between vessel and stevedore relevant to vessel's responsibility for safety of stevedore's employees). The question was put to the jury, and the jury decided, that the *vessel* was negligent in either its supervision of the load operation or its failure to warn plaintiff of a dangerous condition, or both. The vessel discharged its duties through the master, who was an agent of both the Owner and the Time-Charterer under the charter party. Thus,

inasmuch as the jury decided that the loading operations were negligently supervised, it was correct to hold both the Owner and the Time-Charterer liable. It was not up to plaintiff to prove, as between the defendants, which party had contracted to bear the responsibility for loading and unloading operations.

Second, the interpretation of the contract in this context was a question of law and should have been decided by the court. *See, e. g., Migut v. Hyman-Michaels Co.*, 571 F.2d 352 (6th Cir. 1978); *Fernandez v. Chios Shipping Co.*, 542 F.2d 145, 151-53 (2d Cir. 1976). Since the trial court has not considered the question, this court is entitled to do so in the first instance. *See East Oakland-Fruitvale Planning Council v. Rumsfeld*, 471 F.2d 524, 529 (9th Cir. 1972).

[3] The issue before us is whether Clause 8 of the charter party entered into by the defendants places the responsibility for injuries to longshoremen caused by the negligent supervision of cargo operations on the Owner or on the Time-Charterer. The charter party in question, the New York Produce Exchange form, is widely used and has been construed frequently by the courts. *See, e.. g., Fernandez v. Chios Shipping Co.*, 542 F.2d 145 (2d Cir. 1976); *Nichimen Co. v. M. V. Farland*, 462 F.2d 319, 330-34 (2d Cir. 1972). *See generally* G. Gilmore & C. Black, *The Law of Admiralty* 229-39, 1003-10 (2d ed. 1975); M. Wilford, T. Coghlin, & N. Healy, *Time Charters* 137-42 (1978). The Second Circuit in *Fernandez* faced the identical issue. It held that Clause 8 of the charter party, which makes the time-charterer responsible for the "load, stow, trim and discharge" of the cargo, see note 4 *supra*, also makes the

time-charterer primarily liable for any injury to cargo or longshoremen which results from the improper performance of those operations. *Id.* at 151-53.

We agree with the decision of the Second Circuit.[5] Because plaintiff's injury was caused by improper loading of the cargo, we hold that the Time-Charterer must indemnify the Owner for any damages paid to plaintiff.

REVERSED and REMANDED for proceedings consistent with this opinion.

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[5] Defendant Time-Charterer argues that the Fifth Circuit reached a contrary conclusion in D/S Ove Skou v. Hebert, 365 F.2d 341, 351-52 (1966). That case was decided prior to the 1972 amendments to the LHWCA. The court denied the owner indemnity from the time-charterer for damages owed to an injured longshoreman, under Clause 8 of the charter party. See id. at 344 n. 5. The court held that the time-charterer made no warranties to the owner that the stevedores hired by the time-charterer would perform in a workmanlike manner. The jury had found that the owner negligently maintained its ship in a defective condition, and that the stevedore negligently failed to discover the condition and correct it. In contrast, in the case at bar the negligence found by the jury occurred in the course of precisely those operations for which the time-charterer had assumed contractual responsibility. The defect was not one in the ship's equipment, as it was in Hebert. Had it been, we would certainly reach a different result, since the Owner expressly warranted in the charter party that it would maintain the ship in a seaworthy condition.

APPENDIX B

OPINION OF DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JAMES TURNER,	)	
	)	
Plaintiff,	)	Civil No. 75-727
	)	
v.	)	ORDER
	)	
JAPAN LINES [sic], LTD., and PHILIPPINE PRESIDENT LINES, INC., MANILA,	)	
	)	
Defendants.	)	

Plaintiff, a longshoreman, was injured while unloading a cargo of plywood which had been loaded in Japan. The defendant Japan Lines [sic], Ltd. is the charterer, and the defendant Philippine President Lines, Inc., Manila, is the owner of the vessel involved. In this negligence action the jury returned a verdict against both defendants for $955,976.11.

Both defendants' motions for directed verdict were denied and they now each move for a judgment notwithstanding the verdict.

The cargo had been defectively shored in Japan by an independent contractor who was under the supervision of a marine surveyor hired by the charterer.

The plywood was stowed against the side or skin of the vessel's No. 2 lower hold. The defective shoring was covered over by plywood and could not be seen until

the plywood was being unloaded. Plaintiff does not contend that there is evidence that the Master or ship's crew had actual knowledge of the defect in the condition of the cargo. He contends that the evidence supports a finding of constructive knowledge.

The Master and crew had no duty to supervise the details of the work of the contractors hired to shore the cargo, particularly where the work was being supervised by a surveyor hired for that purpose. There was no evidence from which the jury could find that the Master or crew should have known of the danger and thus there was no constructive knowledge. There was insufficient evidence to create a question of fact on the issue of negligence on the part of the Master or crew. *Ruffino v. Scindia Steam Navigation Co.*, 559 F.2d 861 (2nd Cir. 1977).

Plaintiff relies on the testimony of two expert witnesses to the effect that the Master is responsible for the condition of the ship and the entire cargo. In my view this is insufficient to establish negligence in the circumstances of this case under the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 910, *et seq*.

Plaintiff also contends that the charter party supports his claim against both defendants.

Clause 8 of the charter party provides:

> That the Captain shall prosecute his voyages with the utmost dispatch, and shall render all customary assistance with ship's crew and boats. The

> Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow, and trim and discharge the cargo at their expense and risk under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts.

This Clause is modified by Clause 42 in the typewritten provisions, which states:

> The Master to prosecute all voyages with the utmost dispatch and to render customary assistance with the vessel's crew. The Master to be under the orders of the Charterers as regards employment, agency or other arrangements. The Charterers to indemnify the Owners against all consequences or liabilities arising from the Master, Officers or Agents signing Bills of Lading or other documents or otherwise complying with such orders. The Owners not to be responsible for shortage, mixture, marks, or for the number of pieces or packages, nor for damage to or claim on cargo caused by bad stowage or otherwise provided that the same does not arise from any lack of diligence on the part of the Master or crew. Memorandum in support of Japan Lines' [sic] Motion for Judgment N.O.V.

The charter party language is intended to allocate liability to owners of damaged cargo between the shipowner and the time charterer. It creates no liability or duty to an injured workman.

Defendant Japan Lines [sic], Ltd. moves in the alternative for an order granting a new trial on the issue of damages. Defendant Philippine President Lines moves in the alternative for an order remitting the amount of the verdict. The motions for a new trial on damages and for remittitur should be denied. Plaintiff suffered injury to the brain and has been permanently disabled from driving an auto or from working near machinery or in locations where falls pose a particular problem. The evidence is clear that his petit mal epilepsy is the result of his injury.

IT IS HEREBY ORDERED that defendants' motions for judgment n.o.v. are granted, and the judgment previously entered herein on the jury verdict is set aside and judgment shall be entered in favor of defendants and the plaintiff's complaint dismissed.

Dated this 11th day of January, 1979.

/s/ Edward Leavy
United States Magistrate

U.S. DISTRICT COURT
DISTRICT OF OREGON
FILED
JAN 11 1979
ROBERT M. CHRIST, CLERK
By:_____ DEPUTY

APPENDIX C

JUDGMENT OF NINTH CIRCUIT

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NOTICE OF ENTRY OF JUDGMENT

Judgment was entered in this case as of the file stamp date on the attached decision of the court. If the decision is by opinion, judgment was entered as of the decision date printed on the slip opinion.

APPENDIX D

ORDER ON REHEARING OF NINTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JAMES TURNER, Plaintiff-Appellant and Cross-Appellee, v. JAPAN LINE, LTD., and PHILIPPINE PRESIDENT LINES, INC., MANILA, Defendants-Appellees and Cross-Appellants.	)	Nos. 79-4060, 79-4062 79-4182 ORDER

BEFORE: FLETCHER and FERGUSON, Circuit Judges, and GRANT, District Judge.

The petition of Japan Lines [sic], Ltd., for rehearing and suggestion for rehearing en banc are hereby denied and the petition for rehearing of Philippine President Lines for rehearing is hereby denied.

FILED
MAY 24 1982
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

APPENDIX E

Longshoremen's and Harbor Workers' Compensation Act [33 U.S.C. § 905(b)]

§ 905(b). "In the event of injury to a person covered under this chapter caused by the *negligence of a vessel*, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. *If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel.* If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. *The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.* The remedy provided in this subsection shall be exclusive of all other remedies against the vessel

except remedies available under this chapter."

Office - Supreme Court, U.S.
FILED
AUG 12 1982
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-99

PHILIPPINE PRESIDENT LINES, INC., MANILA,

Petitioner,

v.

JAMES TURNER and JAPAN LINE, LTD.,

Respondents.

BRIEF OF RESPONDENT JAMES TURNER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is certiorari appropriate to review a decision of the Ninth Circuit upholding a longshoreman's verdict and judgment against a shipowner for injuries sustained from the collapse of a stow of cargo where the sole issue presented by the shipowner's Petition is whether a vessel has "* * * a higher standard of care to United States longshoremen when loading cargo in foreign ports than when loading cargo in United States ports" and the record below discloses the following:

(a) The case was not tried or the jury instructed upon the issue presented by the shipowner's Petition;

(b) The case was tried upon a theory that the chief officer and mates of the Petitioner's vessel violated or negligently performed a universal maritime safety custom and practice which resulted in injury to Respondent Turner; and unrebutted

lay and expert testimony was introduced in support of that position;

(c) The Ninth Circuit upheld the resulting verdict in favor of Respondent Turner after measuring his evidence against the requirements of Scindia Steam Navigation Co., Ltd. v. De Los Santos, --- US ---, 101 S Ct 1614, 68 L Ed2d 1 (1981), and properly finding that the evidence met the requirements of Santos;

(d) The decision of the Ninth Circuit did not hold, contrary to the contentions of Petitioner, that a vessel owes "a higher standard of care to United States longshoremen when loading cargo in foreign ports than when loading cargo in United States ports"; and

(e) There is no conflict of decision among the Circuit Courts of Appeal.

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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-99

PHILIPPINE PRESIDENT LINES, INC., MANILA,

Petitioner,

v.

JAMES TURNER and JAPAN LINE, LTD.,

Respondents.

BRIEF OF RESPONDENT JAMES TURNER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Petition filed by Philippine President Lines, Inc. is a companion to that filed by Japan Line, Ltd., No. 81-2349, although the questions presented by the two Petitions are different.

Respondent Turner believes that Philippine President Lines has omitted

from its Petition much that is material to this Court's inquiry whether to grant or deny certiorari. Accordingly, the evidence on which Plaintiff's verdict and judgment were based is set forth in greater detail below.

Respondent James Turner, a longshoreman employed at the Port of Longview, Washington, suffered brain damage and resulting psychomotor seizure epilepsy when a cargo of plywood, defectively shored when it was stowed aboard a vessel in Japan, collapsed beneath his feet.

Turner brought an action against Petitioners Philippine President Lines, Inc. as owner of the vessel and against Respondent Japan Line, Ltd. as time charterer. (CR 1, 76, 77).

Turner was injured on June 13, 1974, while employed in the lower hold of the vessel PRESIDENT QUEZON (CR 393, 394; Tr. 96-97, 104-105, 111, 159, 170,

172). He was standing on top of a stow consisting of stacked bundles of plywood when the bundles collapsed, carrying Turner with them. Turner's head struck a steel stanchion. (Tr. 111-112, 170, 172).

The stow collapsed because the bundles were stacked on each other against the curvature or "sheer" of the vessel's hull, and there was no shoring underneath. (Tr. 121-122, 146-147, 152, 162-163, 167). When layers of cargo are stacked on one another against the sheer of the hull, each layer rests partly on the bundle below it and partly above a void. Under such circumstances, it is necessary for marine carpenters or longshoremen to nail together a wood platform consisting of dunnage, vertical shoring and horizontal shoring in the vacant space, so that upper layers of cargo will have a firm support, and will not

be resting above thin air against the curvature of the hull. (Tr. 146-147, 152, 162-163, 167, 174-175, 120-121, 173).

It was undisputed that neither plaintiff nor his stevedore employer had any reason to suspect that the plywood cargo was unstable because of lack of shoring. (Tr. 122, 163, 174). Thus, the condition of the stow presented a life threatening trap, concealed from the longshoremen required to work about it.

Two expert witnesses, sea captains called by the plaintiff, testified without contradiction or rebuttal that it is the obligation and practice of the vessel's captain and mates to inspect and supervise the work of shoring cargo against the sheer of the hull. Lack of shoring, or improper shoring, may permit the cargo to shift in the hold when the vessel rolls at sea, threatening not only the

cargo but the vessel and crew. (Tr. 144, 147, 153, 167). For those reasons, as well as to protect longshoremen or seamen required to work about the stow (Tr. 144, 146, 147), it is both the duty and practice of the master and mates of all vessels of every country to supervise personally the shoring of the cargo in those areas where it is stowed against the sheer of the hull.

Captain William Brandt, a ship's officer for 25 years with additional experience as a maritime consultant and stevedore superintendent, testified for Turner that it is both the custom and responsibility of the officer in charge of a vessel to see that shoring is put in place (Tr. 145), and he cannot rely upon others to carry out this responsibility. (Tr. 149). Either the captain or one of his mates is always on watch on the vessel (Tr. 149, 150). The captain's

replacement is the "chief mate", who is also generally called the "loading mate" (Tr. 149, 150). The mate is supposed to check to be sure that the cargo is properly loaded, especially "at the bottom of the hatch". (Tr. 151, 152). The custom and practice of the master is the same on all vessels of all countries (Tr. 143-145).

Captain Henrik Sievers, a seaman and ship's officer for 50 years, testified for Turner that the duties of a master do not vary from one ship or nationality to another, that it is improper to stow cargo against the sheer of the vessel without shoring, and that it is the responsibility of the master to see that the cargo is properly stowed and shored. (Tr. 165-168).

The chief officer of the vessel PRESIDENT QUEZON, Captain Santos Pucan, was listed as a witness in the Pretrial Order by the Petitioner (CR 402), and

was actually brought to the trial by the Petitioner and was present in the courthouse during the trial (Tr. 242). Nevertheless, Captain Pucan did not testify. Although the Ninth Circuit did not find it necessary to say so (App-12, ftn 3; 651 F2d at 1305), it is a commonplace of maritime law that once a party has made out a prima facie case against a vessel, the failure of the shipowner to call available crew members in rebuttal is "as fatal as positive evidence in support or confirmation of the charge." The New York, 175 US 187, 204-205 (1899); O. F. Shearer & Sons v. Cincinnati Marine Service, Inc., 279 F2d 68 (CA 6, 1960); The Fred M. Laurence, 15 F 635, 636 (E.D. NY, 1883); The Joseph B. Thomas, 81 F 578 (N. D. Cal, 1897); Austerberry v. U. S., 169 F2d 583, 593 (CA 6, 1948); Bohle v. Matson Navigation Co., 243 Or 196, 412 P2d 367 (1966); The Cananova, 297 F 658,

662 (E. D. Penn, 1923); The Louise Rugge, 239 F 458, 462 (CA 3, 1917); The Grace A. Barrett, 73 F Supp 832 (S. D. NY, 1947).

There was testimony that shoring requires many hours of labor, so that the ship's officers had ample time to inspect the work (Tr. 175). The vessel's log noted the hour that the marine carpenters who supposedly were to perform the shoring work went into the hatch where injury occurred, so that the defendants could not claim ignorance of the time or place that the shoring was to be carried out. (Def. Ex. 2002; Tr. 221, 258).

Thus, there was proof that it is the practice of the ship's captain and mates to supervise the work of shoring cargo stowed against the sheer of the hull, that on the PRESIDENT QUEZON the cargo was not shored, and as a result the stow collapsed while Turner was at work on it. Moreover, this testimony

was uncontradicted, since the vessel owner called neither Captain Pucan, who had been brought to the courtroom by the vessel owner, or any other witness to dispute either the scope of the crew's duties or the facts leading to Turner's injury.

By agreement of the parties, the case was tried to a jury before a United States Magistrate. The jury returned a verdict against both the vessel owner (Petitioner Philippine President Lines, Inc.) and charterer (Japan Line, Ltd.). (CR 413, 414). Both defendants filed motions for judgment notwithstanding the verdict or, in the alternative, for a new trial. (CR 416, 448). The Magistrate granted judgment n.o.v. in favor of both defendants, but denied the alternative motions for new trial. (CR 530, 533, 534). To satisfy the requirements of the Magistrate's Act, a United States District Judge signed

the order directing the clerk to enter a judgment of dismissal (CR. 534), although the judge did not actually participate in the trial. The United States Court of Appeals for the Ninth Circuit ordered the judgment reinstated and held that Petitioner was entitled to indemnity, for any damages paid to Turner, from the charterer Japan Line, Ltd. Petitioner had filed a cross-claim for indemnity against Japan Line. (CR 214, 215).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. The decision of the Ninth Circuit does not impose upon a vessel a higher standard of care when loading in foreign ports than when loading in United States ports. Turner's case was not tried in the District Court, nor was the jury instructed, upon such a theory. The issue before the Ninth Circuit was whether plaintiff's evidence met the requirements of Scindia Steam Navigation Co. v. De Los Santos,

--- US ---, 101 S Ct 1614, 68 L Ed2d 1, (1981). The Ninth Circuit considered Turner's evidence in the light of Santos and properly held that Turner had made out a jury question.

The sole question presented by Petitioner is whether a vessel has "* * * a higher standard of care to United States longshoremen when loading cargo in foreign ports than when loading cargo in United States ports." A grant of certiorari to decide that question would be improvident, because the issue is not raised by the record below. Respondent Turner did not try his case upon any such theory. The jury was not instructed upon such a theory. The Magistrate did not grant judgment notwithstanding the verdict for Turner's failure to meet such a burden. Turner did not urge such a theory on appeal, either in briefs or argument. The Ninth Circuit held only that Turner's

evidence satisfied the requirements of Scindia Steam Navigation Co., Ltd. v. De Los Santos.

The shipowner defended this case as though a harbor worker is fated to lose every negligence action brought against a vessel regardless of the quality of the evidence. Turner offered unrebutted proof that the master and mates were negligent in the performance of safety customs and practices observed by all ship's officers. He called expert witnesses to testify that the master and mates of all vessels of all countries supervise the shoring of cargo against the sheer of the hull. He produced evidence that the work of shoring takes many hours, and from the vessel's log proved that the master knew of the hour the shoring crew came aboard and went into the hatch where injury occurred.

The defendants called no witnesses at all (Tr. 222, 223), not even the ship's captain who was in the courtroom, and, indeed, did not even cross-examine Captain Sievers, one of Turner's experts, who had testified that it is the responsibility of the master to see that cargo is properly stowed and shored. (Tr. 165-168).

Turner made a factual argument that he was injured because the vessel failed to comply with maritime custom and practice observed by all ship's officers. He did not rely upon some theory that a vessel owner has an obligation imposed by law to supervise the loading of cargo in foreign ports. In other words, plaintiff proved his case by establishing as a matter of fact, through witnesses, what ship's officers have customarily done in the past and what in actual practice they are supposed to do to

insure the safety of the vessel and crew. Plaintiff did not seek, or obtain, any instructions that as a matter of law the vessel owner was obligated to supervise the work of foreign stevedores. Indeed, the trial judge pointedly instructed that no such obligation existed. (Tr. 299).

The trial judge read plaintiff's allegations of negligence to the jury. They were as follows:

> "In failure to require the shoring of the plywood in the lower hold of the No. 2 hatch in such a manner that it would not give way while workmen, including the plaintiff, were employed upon the walking and working surface of the plywood. Next, in failing to inspect the shoring to determine that it was properly constructed. Next, in failing to require that the shoring be * * * properly constructed and installed in the Port of Kushiro. And next, in failing to warn longshoremen discharging the plywood cargo, including the plaintiff, that the shoring was not properly constructed and installed. And next, in failing to require the use of H or vertical shoring in the wing tiers." (Tr. 297).

The Court then instructed that a shipowner must use "reasonable care in order to

avoid injury to a longshoreman aboard the vessel in any situation in which it can reasonably be anticipated that a failure to use such care might result in such injury," (Tr. 297, 298), and defined reasonable care and negligence in the manner common to tort actions based upon negligence:

> "Reasonable care is that care which persons or corporations of ordinary prudence, exercise in the management of their own affairs in order to avoid injury to themselves or to others. Failure to use such care is negligence. Negligence, therefore, is the doing of some act which a reasonably prudent person would not do or the failure to do something which a reasonably prudent person or corporation would do under the same or similar circumstances. The care should be in keeping with dangers apparent or reasonably to be expected at the time and place in question." (Tr. 298).

The trial court instructed that the vessel owner "* * * has no duty to supervise the minute details of work entrusted to a competent stevedore, so long as the shipowner uses reasonable care." (Tr. 299).

The trial judge did not instruct that the vessel had a duty imposed by law to inspect the work of foreign stevedores. To the contrary, the trial judge instructed that the general authority of the master over his vessel "* * * does not create a duty on the part of the shipowner to supervise the work of the contractor hired to load or unload the cargo." (Tr. 299). Accordingly, the sole issue raised by the shipowner in its Petition was not presented as a basis of recovery to the trial jury.

Moreover, the Ninth Circuit did not hold, on Turner's appeal, that Turner was entitled to recover because the vessel owner had a legally imposed duty to inspect the work of foreign stevedores. The Ninth Circuit deferred decision of Turner's appeal until Santos was decided by this Court, and wrote its opinion in the light of Santos. While

Part IIA of the Ninth Circuit's opinion (entitled "Vessel's Duty to Longshoremen") contains some obiter unnecessary to the decision, with which this Court in an appropriate case may agree or disagree,[1] the Court need look no further than Part IIB of the decision (entitled "Sufficiency of the Evidence"), to determine that the Ninth Circuit properly measured plaintiff's evidence against the requirements of

---

1. The Ninth Circuit expressed the view that a vessel "* * * can insure safety by choosing a reliable foreign stevedore, supervising its work when necessary, and warning the offloading stevedore of concealed dangerous conditions created by the foreign stevedore." "Foreign stevedore", in the context of the Ninth Circuit's decision, refers to any "onloading stevedore", whether from a foreign country or a United States port other than the port of discharge. Since uncontradicted evidence established that ship's officers do supervise the kind of stowage which resulted in Turner's injury, the general views of the Ninth Circuit, which were not an issue before this Court in Santos, are dictum.

Santos. Material portions of Part IIB are set forth below:

> "The next question we must consider is whether the plaintiff presented sufficient evidence from which the jury could have concluded that the vessel knew or should have known of the lack of shoring in the hold, and of the resulting danger. We think that sufficient evidence was presented.
>
> * * * * *
>
> As noted above, the plaintiff presented experts who testified as to the custom in the industry with respect to the master's, and hence the vessel's, responsibility. Defendants argue that this testimony was irrelevant and entitled to no weight at all, because the experts spoke in terms of the master's duty to ensure the 'seaworthiness' of the vessel, a concept supposedly irrelevant under § 905(b). This argument, however, misses the point. The experts testified not about legal conclusions ('unseaworthiness' or 'negligence') but about custom in the industry with respect to the master's duties. Furthermore, the master is responsible for the seaworthiness of the vessel; he is simply not liable without fault to injured longshoremen. * * * Since the jury was quite properly not instructed in terms of strict liability for unseaworthiness, there is no possibility that it might have

confused the two related meanings of the term.

The Supreme Court in Scindia observed that a 'necessary inquiry is whether the pertinent statutes, regulations or custom place or assume a continuing duty on the vessel.' 101 S Ct at 1626 (Emphasis added).

We believe that the expert testimony offered by plaintiff was relevant, and perhaps necessary, to establish the customary scope of the master's duties.

In addition to this expert testimony, plaintiff offered the testimony of longshoremen as to how the cargo should have been shored and how long the shoring should have taken; entries into the ship's log noting when the marine carpenter entered the hold; and testimony that the master or his mates were responsible for continuous supervision of the loading operations, particularly the shoring of the cargo. Plaintiff also produced evidence that the stow of the cargo was unreasonably dangerous to the offloading longshoremen, and that the defect could not[2] have been discovered by them." (App-10-12; 651 F2d 1300, 1304-1305).

---

2. The underlined word was omitted from the lower court's opinion as set forth in the Appendix to the Petition (App-12).

In Santos, the majority and all concurring justices of this Court agreed that a harbor worker may make out a case of negligence based upon the vessel's violation or negligent performance of a custom and practice of the sea. (68 L Ed2d 1, 15, 18, 20, 21). It appears to have been this Court's intention not to preclude recovery in any case where an injured harbor worker could prove factually that he was injured through a vessel's failure to take action of the kind traditionally undertaken by the crew with respect to cargo operations. In essence, the Court recognized that without the taking of evidence a judicial tribunal cannot know the extent of the crew's traditional involvement in the stowage and discharge of cargo.

Respondent Turner proved, through the testimony of two sea captains, that it is the universal practice of captains

and mates of all nationalities to supervise the work of stowing cargo against the sheer of the hull, since lack of shoring, or improper shoring, may threaten not only the cargo but the vessel and crew. (Tr. 144, 147, 153, 167). The vessel failed to call its own chief officer to the witness stand in rebuttal, although he was present in the courtroom and could have disputed the testimony of plaintiff's experts if it was not true.

Although not before the jury, a document in the Clerk's Record contains material which indicates why Captain Pucan did not testify. Motoi Shikano, an executive of the marine carpentry firm which was supposed to do the shoring work on the vessel PRESIDENT QUEZON, filed an affidavit that his company from time to time "at the request of Japan Line, Ltd. rendered shoring and lashing work for Japan Line's own vessels

and/or chartered vessels. All works were done under the supervision and direction of the chief officer of the vessel and/or often under the supervision of a port captain dispatched from Japan Line, Ltd." (CR 45). With respect to the PRESIDENT QUEZON, Mr. Shikano stated: "The shoring work aboard said vessel began on May 22 at 1430 and continued until the 24th at 2130. All of the work was done under the chief officer's supervision and with his approval." (CR 46). (Emphasis added).

Mr. Shikano's affidavit establishes, if any proof is required, that the testimony of plaintiff's experts actually does reflect the duty of the master and mates under maritime custom and practice. Moreover, more than one recent case contains proof that ship's officers do in fact supervise important details of the stowage of cargo. Sometimes the vessel itself

offers testimony that its officers have supervised the stow. See, e. g., Nichiman Company, Inc. v. M.V. Farland, 462 F2d 319, 333 (CA 2, 1972); Lemon v. Bank Lines, Ltd., 656 F2d 110 (CA 5, 1981); Marant v. Farrell Lines, Inc., 550 F2d 142, 143 (CA 3, 1977).

In summary, the issue presented for this Court's consideration by the Petition has no support in the record. There was uncontradicted evidence of Petitioner's violation or negligent performance of a maritime custom and practice, which resulted in injury to Turner. The trial court neither instructed the jury that the shipowner owed a general duty imposed by law to supervise the work of foreign stevedores (in fact the court instructed to the contrary), nor was the decision of the Ninth Circuit based on the existence of a legal obligation. Turner proved factually the existence of a custom and

practice which the shipowner violated. That proof was adequate under Santos to make out a jury question.

2. There is no conflict of decision among the circuits with respect to the question presented for review.

Philippine President Lines does not contend that the decision below is in conflict with any other Circuit. However, the decision below, in stating that the vessel "* * * had a duty to protect the plaintiff against concealed dangers created by a foreign stevedore which the vessel could, in the exercise of care, have corrected or warned of" (App-9, 10), indicates further by footnote that "to the extent that this holding is inconsistent with the result reached in Ruffino v. Scindia Steam Navigation Co., 559 F2d 861 (2d Cir 1977), we must * * * disagree with the Second Circuit." The Ninth Circuit thought that Ruffino might

be construed to hold that the vessel cannot be "held liable to an offloading longshoreman for injuries which result from the loading stevedore's negligence." (App-7; 651 F2d at 1303).

Factually, our case is unlike Ruffino, so that there is no conflict of decision between the Second and Ninth Circuits. Ruffino involved injury to a longshoreman who "stepped on the end of a rug which overhung a space between two pallets of tea". Unlike our case, there was no evidence in Ruffino that the condition of the stow was of a nature to endanger the vessel and crew, just as there was no evidence either in Ruffino or our case that it is the practice of the captain and mates to eliminate all spaces, however small or insignificant, between packages of cargo. Under such circumstances, the Second Circuit held that the shipowner "* * * was not required to

supervise the minute details of the loading stevedore's work", a ruling factually consistent with the case at bar, where shoring of the cargo against the curvature of the ship's hull was anything but a "minute detail".

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

FRANK POZZI
RAYMOND J. CONBOY

Attorneys for Respondent
James Turner